

STATE OF MICHIGAN  
COURT OF APPEALS

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SHIRLEY A. HELWIG,

Plaintiff-Appellee,

v

CARL HELWIG,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2005

No. 250637

Oakland Circuit Court

LC No. 2002-671909-DO

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce entered by the trial court. We affirm in part, but remand for further proceedings regarding the trial court's award of attorney fees in favor of plaintiff. This case is being decided without oral argument under MCR 7.214(E).

I

Defendant first argues that the trial court should not have awarded plaintiff an amount intended to essentially reflect half of the increased value of the home bought during the marriage and where the parties resided for most of their marriage. We disagree.

In a divorce case, the trial court's factual findings are reviewed for clear error with a finding being clearly erroneous if, after review of the entire record, the reviewing court has a firm and definite conviction that a mistake was made. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). If the trial court's factual findings are upheld, this Court must decide whether its dispositive rulings were fair and equitable in light of those facts. *Id.* at 670. A disposition ruling is discretionary and should be affirmed unless this Court has a firm conviction that it is inequitable. *Id.*

Assets earned by a spouse during a marriage are properly considered part of the marital estate. *McNamara, supra* at 670. Generally, marital assets are subject to being divided between the parties while the parties' separate assets may not be invaded. *Id.* The factors to be considered in dividing marital property are:

- (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties,

(8) past relations and conduct of the parties, and (9) general principles of equity. [*Dart v Dart*, 460 Mich 573, 583; 597 NW2d 82 (1999), quoting *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).]

First, defendant attacks the trial court's treatment of the increase in the value of the home as marital property. But it is undisputed that the parties lived together in that home as spouses. Appreciation in the value of a marital home shared and maintained by the parties during a marriage is part of the marital estate. *Reeves v Reeves*, 226 Mich App 490, 495-496; 575 NW2d 1 (1997). Accordingly, we reject defendant's position that the increase in the value of the home at issue is not part of the marital estate as a matter of law.

An equitable distribution of marital assets "means that they will be roughly congruent." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). "Any significant departure from that goal should be supported by a clear exposition of the trial court's rationale." *Id.*, quoting *Knowles v Knowles*, 185 Mich App 497, 501; 462 NW2d 777 (1990). Given the presumption in favor of congruent distribution of marital property, there is no basis for this Court to have a firm conviction that the trial court's equal division of the increased value of the marital home was inequitable. *McNamara*, *supra* at 670.

Defendant asserts that a portion of the money that plaintiff received from the sale of her condominium must have been earned during the marriage, and should have been included in the division of property. Plaintiff testified that she sold her condominium the same year the parties married. There is no evidence that there was an increase in market value of that condominium from the time the parties married until it was sold. Equity built up in a property owned by one party that occurs prior to the start of a marriage is not part of the marital estate. *Reeves*, *supra* at 492, 495-496. Thus, defendant has not established any error based on the trial court's failure to award him part of the money that plaintiff obtained from selling the condominium because it is not clear that there was any increase in the value of the condominium after the parties married.

A comparison of the assets of the parties provides no sound reason for concluding that plaintiff should have been awarded less than half of the increased equity in the home. Similarly, the trial court did not err in failing to find that consideration of the earning ability of the parties favored him because plaintiff receives a larger amount of Social Security and pension payments than he does and is also working for additional income while he is not. Defendant acknowledges that he is in relatively good health and does not claim that he would be unable to similarly work to supplement his income. There is no basis for concluding that the "earning ability" of the parties favors defendant merely because plaintiff chooses to continue employment while he does not. In sum, we conclude that there is no basis for a firm conviction that it was inequitable for the trial court to essentially award plaintiff half of the increase in the value of the marital home at issue and, thus, we affirm this award.

Defendant further claims that plaintiff "waived" or "forfeited" any right to a portion of the value of the house at issue by not objecting to defendant having arranged for the home to be bought by his trust. This argument is based on authority pertaining to waiver or forfeiture of claims or objections during adversarial proceedings or by failing to bring a cause of action. At the time the home was purchased, the parties were married and not in the course of divorce proceedings. It is manifest that a party's failure to "object" to action by a spouse prior to the

initiation of divorce proceedings cannot somehow waive or forfeit a claim to being awarded part of marital property in a subsequent divorce proceeding.

## II

In quite cursory terms, defendant challenges the trial court's decision to award plaintiff a 1998 Cadillac as part of the divorce judgment. Plaintiff was awarded one Cadillac, while defendant was awarded a 1996 Cadillac and any other vehicles in his possession. It is evident that the trial court awarded each party from the marital property the car that party primarily drove. On its face, this award was roughly congruent. There is no plausible basis for a firm conviction that it was inequitable for the trial court to award plaintiff the car that she primarily drove when it did likewise for defendant and, thus, affirm the award of the car at issue to plaintiff. *McNamara, supra* at 670.

Defendant also argues in a cursory manner that it is inequitable that plaintiff still possesses furniture that he bought and that was taken on a day when plaintiff went to the marital home. The divorce judgment provided for the parties to agree if possible on the division of such personal property and, if they were unable to do so, for the matter to be resolved by binding arbitration. Defendant does not specify the furniture to which he is referring or how that furniture was awarded to him. Thus, defendant has abandoned this argument by failing to meaningfully argue its merits. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 253; 673 NW2d 805 (2003).

## III

Finally, defendant argues that the trial court improperly awarded plaintiff \$2,500 in attorney fees. We review a trial court's decision to award attorney fees in a divorce case for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003).

The only reason provided by the trial court for awarding attorney fees in favor of plaintiff was that defendant was in a stronger financial position. However, an award of attorney fees in a divorce case is appropriate only as necessary to enable a party to prosecute or defend a suit without invading assets on which the party is relying for support or if the party requesting attorney fees has been forced to incur expenses as a result of unreasonable conduct by the other party in the course of litigation. *Id.* at 438; *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Accordingly, the trial court's observation that defendant was in a much stronger financial position was an insufficient ground for awarding attorney fees. Further, it is not apparent that plaintiff would be unable to pay her attorney fees without invading assets that she relies on for support. The total extent of plaintiff's attorney fees is not indicated in the record, but given that she was awarded \$39,100 from the sale of the house, unless her total attorney fees exceeded that amount, it would seem that plaintiff could have paid her attorney fees out of the \$39,100 award without having to invade assets on which she was relying for support. Therefore, because the trial court's rationale for awarding attorney fees was flawed and it is unclear from the record whether an appropriate basis for awarding attorney fees might exist, we conclude that this case should be remanded for the trial court to reconsider its award of an attorney fee in light of the appropriate legal standard for making such an award in a divorce case.

We affirm the challenged aspects of the property division in the judgment of divorce. But we remand this case to the trial court for reconsideration of the attorney fee issue. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Stephen L. Borrello